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Subject: Fw: Distance Learning Comments
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-----Original Message-----

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Date: Friday, January 15, 1999 6:21 PM
Subject: Distance Learning Comments

> TO: U.S. Copyright Office
> FROM: Professor Andrew Beckerman-Rodau, Ohio Northern University Pettit
> College of Law, Ada, Ohio
> SUBJECT: Digital Millennium Copyright Act - Comments with regard to
> Distance Learning
> DATE: January 15, 1999
>
> The Digital Millennium Copyright Act identifies 8 factors to consider with
> regard to distance learning. The number of each comment below corresponds
> to the same number factor in the Act.
>
> (1) The existing Copyright Act already recognizes the need for an exemption
> from certain copyright rights for educational activities conducted at
> non-profit educational institutions. Section 110(1) of the Act provides
> that the "performance" or "display" of a copyrighted work by instructors or
> students in the course of face-to-face teaching activities in a classroom
> or similar place devoted to instruction is not copyright infringement. This
> exemption enables educators to perform or display copyrighted works without
> permission of the copyright owner. However, it does not allow the educator
> to make copies of the copyrighted work. Arguably, this provides a balance
> between the rights of copyright owners and the needs of educators.
> Typically, the educator's use should have minimal effect on the market
> value of the copyrighted work since the educator is limited to performing
> or displaying the work in class. The owner still has the right to recover
> most of the economic value of the work by selling copies of it.
>
> The Copyright Act also provides another educational exemption for

- > non-profit institutions. It allows certain copyrighted works used in an
- > educational context to be performed or displayed in a classroom even if
- > they are transmitted from a remote site via a computer network. (See
- > Copyright Act section 110(2)). This section is really an extension of
- > section 110(1) discussed above. Section 110(2), like section 110(1) above,
- > requires the performance or display of the copyrighted work to occur in a
- > classroom. Both exemptions are modeled on the traditional notion of
- > teaching taking place in a face-to-face environment in a classroom.
- >
- > Distance learning can be viewed as a mere extension of the classroom. Under
- > this approach the existing exemption in sections 110(1) & (2), above, could
- > be extended to apply to distance learning over a computer network or system
- > in addition to face-to-face teaching in a classroom. Arguably, the distance
- > learning environment can be viewed as a mere substitute for the classroom.
- > The actual locations of the instructor and students would be immaterial. As
- > long as the instructors and students are engaged in an educational activity
- > that is being used in lieu of a face-to-face meeting in a classroom it
- > should be included in the above exemptions.
- >
- > (2) Most copyrighted works should be included under a distance learning
- > exemption which permits the "performance" or "display" of a copyrighted
- > work by instructors in an educational environment. However, copyrighted
- > materials which are produced exclusively for educational use in a classroom
- > should not be subject to such an exemption. Application of a distance
- > learning exemption to such materials could effectively destroy the market
- > for such materials. The result of this would be a significant reduction in
- > the availability of educational materials. Alternatively, a distance
- > learning exemption could apply to educational materials; but the exemption
- > should be more restricted when applied to such materials in contrast to its
- > application to other materials. The key is to allow educators to freely use
- > copyrighted materials as educational tools while maintaining a viable
- > market for copyrighted materials.
- >
- > (3) Quantitative limits on the amount of a copyrighted work that an
- > educator could use under a distance learning exemption are difficult to set
- > in the abstract. One approach would be to develop a flexible approach such
- > as that utilized in a "fair use" analysis under section 107 of the
- > Copyright Act. Under a fair use analysis the amount of a copyrighted work
- > that is utilized is merely one factor in determining if the use is a "fair
- > use" and therefore excluded from being copyright infringement. The primary
- > factor in determining whether something is a "fair use" is an evaluation of
- > the impact of the use on the economic market for the copyrighted work. If
- > the market impact is substantial it is unlikely "fair use" will be found.

> In contrast, if the market impact is minimal "fair use" is likely to be
> found. The same market impact analysis could be utilized to determine
> whether the amount of a copyrighted work utilized under a distance learning
> exemption is acceptable or not. Nevertheless, this approach may stifle
> development of distance learning since an educator may be uncertain with
> regard to how much of a copyrighted work she can safely use. Another
> approach would be to create clear quantitative guidelines. Such guidelines
> were previously developed with regard to "fair use" of copyrighted work for
> educational activities. However, unlike those guidelines, the resulting
> guidelines could then be adopted as regulations of the Copyright Office and
> enacted as part of the Code of Federal Regulations. If such distance
> learning guidelines are developed with the input of copyright owners and
> non-profit educational institutions they should adequately balance the
> interests of the various parties.

>
> (4) The benefits of any distance learning exemption should apply to
> instructors participating in a distance learning course offered by a
> non-profit educational institution. Additionally, the non-profit
> educational institution sponsoring the distance learning course should be
> entitled to the benefits of the exemption.

>
> (5) Any distance learning exemption should be limited to an organized
> distance learning course sponsored by a non-profit educational institution.
> Therefore, only students enrolled in a specific distance learning course
> should be designated as recipients of distance learning materials under the
> exemption.

>
> (6) An distance learning exemption permitting use of copyrighted works
> should require minimal technological safeguards to control future
> unauthorized use of such works. The rapidity of technology changes makes
> drafting a rule requiring safeguards problematic. Consequently, the
> distance learning exemption should require that "reasonable" technological
> safeguards should be utilized to: (a) minimize unauthorized access to
> copyrighted materials by those not enrolled in the distance learning
> course; and (b) limit the ability of those enrolled in the course to
> retransmit copyrighted material to third parties. A "reasonable" standard
> could then be defined or interpreted to mean whatever is commercially
> and/or economically reasonable under the current state of technology. For
> example, at the present time access to distance learning material can be
> limited by requiring students enrolled in a distance learning course to
> have a username and password which must be provided to access the
> materials. Alternatively, if the distance learning materials are provided
> via the Web access can be limited to specific domains or to specific IP

> addresses.
>
> (7) If a license for a copyrighted work can not be reasonably obtained the
> distance learning exemption should apply to the work. In contrast, if a
> license is easily obtainable at a reasonable price the need for a distance
> learning exemption for the copyrighted work decreases. Such an approach
> might encourage copyright owners to develop a simple and fast method of
> obtaining a license to utilize materials for distance learning. The
> advantage of this approach is that it allows the marketplace to develop
> mechanisms to balance the economic interests of copyright owners with the
> educational needs of non-profit educational institutions. In contrast, a
> compulsory licensing scheme could be developed for copyrighted works used
> in a distance learning context. Under this approach standard license terms
> and royalty rates would be set periodically by the Copyright Office. This
> approach has already been adopted for certain types of copyrighted works in
> other contexts.
>
> (8) The application of the work-for-hire doctrine with regard to the
> ownership of any copyrights in distance learning materials should be
> directly dealt with. Typically, distance learning materials will be created
> by instructors who are employed by non-profit educational institutions.
> Under the work-for-hire doctrine the determination of whether copyright
> ownership vests in the instructors creating the materials or the
> institutions who employ the instructors is unclear. Under the U.S. Supreme
> Court's interpretation of the doctrine generally its application turns on
> an analysis of the employment relationship between the instructor and the
> institution. This approach produces significant uncertainty in general.
> Additionally, this is an issue that should be specifically studied to
> determine if the relationship between a professor and an educational
> institution should be treated the same as an ordinary employment
> relationship. Or, is such a relationship significantly different to justify
> special treatment.
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